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No. 93-454

In The

Supreme Court of the United States

October Term, 1993

LOUISIANA-PACIFIC CORPORATION,

Petitioner,

vs.

BURTON BAKER,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Idaho

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

Opinions Below 1

Constitutional Provisions, Statutes, and Rules 2

Statement of the Case 4

Argument 6

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE ISSUES RAISED BY LOUISIANA-PACIFIC CORPORATION DO NOT JUSTIFY THE GRANTING OF A WRIT OF CERTIORARI 6

II. BIAS AND PREJUDICE AGAINST LOUISIANA-PACIFIC CORPORATION WHICH WOULD INTERFERE WITH THE RIGHT TO A FAIR HEARING WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT DID NOT OCCUR 7

III. THE IDAHO SUPREME COURT DID NOT MAKE A "FINDING OF FACT" THAT WOULD VIOLATE ARTICLE V, SECTION 9 OF THE IDAHO CONSTITUTION 10

IV. THE IDAHO SUPREME COURT'S DECISION NOT TO PROVIDE ORAL ARGUMENT ON LOUISIANA-PACIFIC CORPORATION'S MOTION TO RECUSE JUSTICE BISTLINE WAS NOT ERROR AND WAS NOT A DENIAL OF DUE PROCESS 11

Conclusion 15

TABLE OF AUTHORITIES

Page

CASES CITED:

Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813, 106 S.Ct. 1580 (1986) 8, 9, 13

Hicks v. Miranda, 442 U.S. 332 (1975) 6

Nelson v. Pumnea, 106 Idaho 48, 675 P.2d 27 (1983) 10

Pierstorff v. Gray's Auto Shop, 58 Idaho 438, 74 P.2d 171 (1937) 10

U. S. v. Lane, 474 U.S 438, 106 S.Ct. 725 (1986) 14

STATUTES CITED:

28 U.S.C. § 2111 ..... 2, 14

UNITED STATES CONSTITUTION CITED:

Fourteenth Amendment 2

RULES CITED:

Rules of the United States Supreme Court

Rule 10.1 6

Idaho Rules of Civil Procedure

Rule 7(b)(3) 2, 12

Rule 40(d)(2) 3, 9, 12

Rule 40(d)(2)(B) 12

OTHER AUTHORITIES CITED:

Idaho Constitution Article V, § 9 ..... 2, 11

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BRIEF IN OPPOSITION

The Respondent, Burton Baker, respectfully prays that the Petition for Writ of Certiorari filed by Petitioner to review the Opinion and Judgment of the Supreme Court of the State of Idaho entered in this matter be denied.

OPINIONS BELOW

The Petition for Writ of Certiorari correctly recites the decisions delivered in the proceedings below.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

1. Constitution of the United States, Amendment 14:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; . . .

2. 28 U.S.C. § 2111:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

3. Constitution of the State of Idaho, Article V, § 9:

> On appeal from orders of the industrial accident board the court shall be limited to a review of questions of law.

4. Idaho Rules of Civil Procedure, Rule 7(b)(3):

> Briefs and arguments on motions. It shall not be necessary to file a brief or memorandum of law in support of a motion, but the moving party must indicate upon the face of the motion whether he desires to present oral argument or file a brief within 14 days with the court in support of the motion. If the moving party does not request oral argument upon the motion . . . the court may deny such motion without notice if the court deems the motion has no merit.

5. Idaho Rules of Civil Procedure, Rule 40(d)(2):

> Disqualification for Cause – (A) Grounds. Any party to an action may disqualify a judge or magistrate for cause from presiding in any action upon any of the following grounds:
>
> 1. That the judge or magistrate is a party, or is interested in the action or proceeding.
>
> 2. That the judge or magistrate is related to either party by consanginuity or affinity within the third degree, computed according to the rules of the law.
>
> 3. That the judge or magistrate has been attorney of counsel for any party in the action or proceeding.
>
> 4. That the judge or magistrate is biased or prejudiced for or against any party or the case in the action.
>
> (B). Motion for Disqualification. Any such disqualification for cause shall be made by a motion to disqualify accompanied by an affidavit of the party or the party's attorney stating distinctly the grounds upon which disqualification is based and the facts relied upon in support of the motion. Such motion for disqualification for cause may be made at any time. The presiding judge or magistrate sought to be disqualified shall grant or deny the motion for disqualification upon notice and hearing in the manner prescribed by these rules for motions.

STATEMENT OF THE CASE

The Idaho Worker's Compensation Act, Title 72, Idaho Code, authorizes the Industrial Commission of the State of Idaho to decide cases involving working people who are hurt on the job. The Industrial Commission of the State of Idaho factually determined that Burton Baker had a 35% disability of the whole person when he sustained multiple fractures in his wrists while working for Louisiana-Pacific Corporation.

Burton Baker was a saw mill worker most of his adult life. On October 21, 1982, while working for Petitioner Louisiana-Pacific Corporation, Burton Baker suffered an on-the-job injury. He was attempting to adjust fire hoses when he fell approximately 8 to 10 feet and landed on a concrete floor. Both wrists hit the concrete floor first. His chin and knees then hit the floor. Both wrists were broken. X-rays of the right forearm revealed a comminuted fracture of the distal radial shaft extending into the articular surface of the fragment. X-rays of the left wrist revealed a non-displaced fracture into the distal radial metaphysis, with a vertical oriented lucency in the lateral aspect.

Burton Baker was hospitalized after the injury. Casts were applied on both arms for three months. Burton Baker voluntarily returned to work without pay in order to exercise his arm. Within six months of the accident he returned to full time work at his former job with Louisiana-Pacific Corporation.

Burton Baker's union went on strike on June 27, 1983. Burton Baker did not cross the picket line. Because he did not cross the picket line, Louisiana-Pacific Corporation

terminated Burton Baker's employment. In April of 1984, Burton Baker began working for the United States Forest Service at a rate of pay which was substantially less than what he received while working for Louisiana-Pacific Corporation.

Burton Baker had long term physical problems because arthritis involved both arms. He was unable to physically do many of the same activities he was capable of doing before he sustained the fractures in his wrists.

After the Industrial Commission of the State of Idaho factually determined that Burton Baker sustained a 35% disability, Petitioner Louisiana-Pacific Corporation filed an appeal to the Idaho Supreme Court. On appeal, in a unanimous decision, the Idaho Supreme Court stated that the evaluation of evidence is left to the sound discretion of the Industrial Commission and that it would not "second-guess" the commission's determination. The Idaho Supreme Court ruled that there was substantial evidence to support the commission's finding of a 35% permanent disability. The Idaho Supreme Court determined that Louisiana-Pacific Corporation's appeal was frivolous and awarded attorney's fees against it because Louisiana-Pacific Corporation's arguments were nothing more than efforts to have the Court reweigh the evidence on appeal.

After receipt of the decision, the Petitioner Louisiana-Pacific Corporation filed a Petition for Rehearing and a Motion to Recuse the Author of the Opinion, Justice Bistline. Both the petition and motion were denied by the Idaho Supreme Court.

ARGUMENT

I

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE ISSUES RAISED BY LOUISIANA-PACIFIC CORPORATION DO NOT JUSTIFY THE GRANTING OF A WRIT OF CERTIORARI.

Rule 10.1 of the Rules of the United States Supreme Court specifies that a petition for a writ of certiorari should be granted only when there are special and important reasons. Rule 10.1 (a) is inapplicable because this is not an appeal from a decision from the United States court of appeals. The cases cited by Louisiana-Pacific Corporation do not support review of the decision of the Idaho Supreme Court based upon the grounds set forth in Rule 10.1 (b) and (c) of the Rules of the United States Supreme Court. The issues raised by Louisiana-Pacific Corporation are not of such importance so as to require review by the United States Supreme Court.

Respondent Burton Baker respectfully requests that the petition be denied. Alternatively, Respondent requests that the United States Supreme Court issue a summary affirmance or a dismissal for want of a substantial federal question. Rule 16.1, Rules of the United States Supreme Court; *Hicks v. Miranda*, 422 U.S. 332 (1975).

II

BIAS AND PREJUDICE AGAINST LOUISIANA-PACIFIC CORPORATION WHICH WOULD INTERFERE WITH THE RIGHT TO A FAIR HEARING WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT DID NOT OCCUR.

Petitioner argues that because an Idaho Supreme Court Justice utilized the term "scab" in a footnote of a decision, it did not receive fair consideration and was denied due process.

A. Justice Bistline Was Not Expressing Personal Bias When He Discussed a "Scab" Laborer in the Footnote.

The Petitioner has taken the term "scab" out of context in arguing that the phrase exhibits bias and prejudice on the part of the Idaho Supreme Court. The footnote, in its full context, related to whether or not Burton Baker should be denied all compensation for his permanent injury because he refused to cross a picket line in 1983. Louisiana-Pacific Corporation argued that because Burton Baker did not cross the picket line he refused "suitable" work and should not receive any compensation. Both the Industrial Commission and the Idaho Supreme Court rejected this argument urged by Louisiana-Pacific Corporation.

The full footnote reads:

> "1. Furthermore, in the author's opinion, Louisiana Pacific did not offer Baker a 'suitable job' within the meaning of the statute, being that the job offer was contingent on Baker crossing a

> picket line and thereafter becoming that lowly form of life aptly known as a 'scab' laborer."

When one examines the full context of the footnote, Justice Bistline was of the opinion that Burton Baker should not be denied compensation for his permanent injury since Louisiana-Pacific did not offer Burton Baker a "suitable job." The job offer to Burton Baker was contingent on Burton Baker becoming a "scab" laborer. Thus, the logical interpretation of the language is that an individual need not cross a picket line and become a scab laborer in order to receive compensation benefits for a permanent injury. Justice Bistline succinctly stated the view held by many people in Bonners Ferry, Idaho, in 1983 about scab laborers. If Burton Baker crossed the picket line and became a "scab," he would be subjected to ridicule, loss of friendship, loss of other job possibilities, and possibly even persecution, situations that are not condoned by any judicial body. The statement did not demonstrate any bias *against* Louisiana-Pacific Corporation.

B. In the Alternative, Regardless of a Finding of Any Personal Bias on the Part of Justice Bistline, Such Bias Did Not Rise to the Level that Would Require a Recusal.

In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), the Court defined the type of bias that would *not* result in disqualification. In *Aetna*, the petitioner sought to disqualify a judge for his general hostility towards insurance companies. Although the justice was eventually disqualified because it was found he had a direct interest in the outcome, the Court stated that bias, based

solely on a general hostility towards insurance companies, falls well below the level that would constitutionally require disqualification. *Aetna*, 475 U.S. at 821. The Court went on to state, "Appellant's allegations of bias and prejudice on this general basis, however, are insufficient to establish any constitutional violation." *Id.* at 821.

If any bias is exhibited in the footnote, it is a general bias which is not directed at Louisiana-Pacific Corporation. There is no demonstration of any bias towards any party throughout the proceedings.

The rule adopted by the Idaho Court that deals with the disqualification of a judge or magistrate for cause is Rule 40(d)(2) of the Idaho Rules of Civil Procedure. Therein, it states that the Judge must be "biased or prejudiced for or against any party or the case in the action." A general bias against scab laborers, if at all, did not rise to the level that would constitutionally require a recusal of Justice Bistline.

The Idaho Supreme Court already considered this issue when it determined not to grant a rehearing to Louisiana-Pacific Corporation. The Petitioner and Respondent submitted briefs on the recusal issue, and the issue was decided as a matter of state law by not granting the petition for a rehearing.

III

THE IDAHO SUPREME COURT DID NOT MAKE A "FINDING OF FACT" THAT WOULD VIOLATE ARTICLE V, SECTION 9 OF THE IDAHO CONSTITUTION.

The Petitioner is correct when it states that the Industrial Commission is to be the fact finder in a worker's compensation claim. *Nelson v. Pumnea*, 106 Idaho 48, 675 P.2d 27 (1983).

The Petitioner alleges that the determination that Burton Baker was not partially disabled at the time he refused to cross the picket line was a finding of fact. A review of the record shows that the Court merely restated the facts provided to the Industrial Commission. In its Findings of Fact, Conclusions of Law, and Proposed Order, the Commission stated that Dr. Hill, the only doctor who examined Burton Baker at the time he refused to cross the picket line, "was of the opinion that Claimant's arms were fine and he could do anything he wished." There is no other medical evidence presented in the record concerning impairment or disability at the time Burton Baker refused to cross the picket line. As stated in *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 74 P.2d 171 (1937):

> "The rule applicable to all witnesses, whether parties or interested in the event of an action, is, that either a board, court, or jury must accept as true the positive uncontradicted testimony of a credible witness, unless his testimony is inherently improbable, or rendered so by facts and circumstances disclosed at the hearing or trial. *Manley v. Harvey Lumber Co.*, 175 Minn. 489, 221 N.W. 913, 914. In *Jeffrey v. Trouse*, 100 Mont. 538,

> 50 P.2d 872, 874, it is held that neither the trial court nor a jury may arbitrarily or capriciously disregard the testimony of a witness unimpeached by any of the modes known to the law, if such testimony does not exceed probability. And in *Arundel v. Turk*, 16 Cal.App.2d 293, 60 P.2d 486, 487, 488, the rule is stated thus; 'Testimony which is inherently improbable may be disregarded, . . . but to warrant such action there must exist either a physical impossibility of the evidence being true, or its falsity must be apparent, without any resort to inferences or deductions.' " 74 P.2d 171 at 175.

Thus, in this case, the Court did nothing more than restate what the Industrial Commission found to be fact and which was uncontroverted. That evidence showed Burton Baker was not partially disabled at the time he refused to cross the picket line.

This issue was also considered by the Idaho Supreme Court in the petition for rehearing made by Louisiana-Pacific. By not granting the petition, the Court made the determination that they did not err in interpreting Article V, Section 9 of the Idaho Constitution.

IV

THE IDAHO SUPREME COURT'S DECISION NOT TO PROVIDE ORAL ARGUMENT ON LOUISIANA-PACIFIC CORPORATION'S MOTION TO RECUSE JUSTICE BISTLINE WAS NOT ERROR AND WAS NOT A DENIAL OF DUE PROCESS.

Louisiana-Pacific Corporation alleges that notice and an oral hearing were required before deciding a motion for recusal. Because no hearing occurred, it alleges it was

denied due process. The applicable Rule is Rule 40(d)(2)(B) of the Idaho Rules of Civil Procedure. Rule 40(d)(2)(B) states:

> "(B). Motion for Disqualification. Any such disqualification for cause shall be made by a motion to disqualify accompanied by an affidavit of the party or his attorney stating distinctly the grounds upon which disqualification is based and the facts relied upon in support of the motion. Such motion for disqualification for cause may be made at any time. The presiding judge or magistrate sought to be disqualified shall grant or deny the motion for disqualification upon notice and hearing in the manner prescribed by these rules for motions." I.R.C.P. 40(d)(2)(B).

The relevant language of the rule is embodied in the last sentence: ". . . in the manner prescribed by these rules for motions." In order to determine whether notice and a hearing are required, it is imperative that the "manner prescribed by these rules" be examined. Rule 7(b)(3) provides the prescribed manner.

> "Briefs and arguments on motions. It shall not be necessary to file a brief or memorandum of law in support of a motion, but the moving party must indicate upon the fact of the motion whether he desires to present oral argument or file a brief within 14 days with the court in support of the motion. If the moving party does not request oral argument upon the motion . . . the court may deny such motion without notice if the court deems the motion has no merit." I.R.C.P. 7(b)(3).

In order to insure that a hearing will be held on the motion, the moving party must indicate on the face of the motion that he would like to present oral argument. Here, there was no such request on the face of the motion to disqualify Justice Bistline. The underlying purpose of giving notice of hearing on motions is to protect the non-moving party by giving the non-moving party the right to be heard. Here, both parties submitted briefs either in support or in opposition to the motion. The decision to deny the motion was based upon the arguments in the briefs. Because both parties had the opportunity to be heard, there was no violation of due process rights due to the lack of notice or because oral argument was not presented.

The Petitioner also contends that the Idaho Supreme Court erred by issuing an order which simultaneously decided the petition for rehearing and the motion for recusal.

The Petitioner makes an assumption that Justice Bistline participated in the deliberations regarding the petition for rehearing, an assumption that is not warranted from the record. Petitioner states in its brief that nothing in the record shows how the decision on Louisiana-Pacific Corporation's petition for rehearing was resolved. However, the order is signed solely by Chief Justice McDevitt. Nonetheless, Petitioner asserts that because the order denying the petition did not state that Justice Bistline did not participate, it can only be presumed that he did.

Such an assumption is not reasonable. In *Aetna Life Insurance v. Lavoie*, 475 U.S. at 820, it was stated that a

presumption of impartiality will be given to judges that have been sworn to administer justice.

Where no facts are provided to support a contention that a judge was involved in any type of wrongdoing, (no matter how minimal) the presumption acts in his favor when he is being accused of acting contrary to the prescribed rules. Within the order denying the petition for rehearing, it is unclear whether Justice Bistline was involved in the decision or in the deliberations. The presumption of impartiality should operate in his favor.

Regardless of whether Justice Bistline was involved in deciding to deny the request for a rehearing submitted by the Petitioner, at most, such involvement would have to be considered harmless error.

Since the early part of the century, courts and legislatures have retreated from allowing a losing party to receive a grant of a new trial or a reversal on the basis of some mere technical error. The result has been the creation of many state and federal statutes and rules of procedure similar to 28 U.S.C. § 2111.

28 U.S.C. § 2111, the federal harmless error statute, provides:

> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Justice Brennan, in his concurring opinion in *U.S. v. Lane*, 474 U.S. 438 (1986), defined what would constitute

"affecting substantial rights." ". . . an error 'affects substantial rights' only if it casts doubt on the outcome of the proceeding." *Id.* at 735.

In the case at bar, the Idaho Supreme Court unanimously found that the evidence was so overwhelmingly in favor of Burton Baker that it ordered Louisiana-Pacific Corporation to pay his attorney's fees for the appeal due to the frivolous nature of the appeal. The Idaho Supreme Court determined that Louisiana-Pacific Corporation's appeal had no merit. To grant certiorari based on an alleged procedural error of simultaneously deciding the motion to recuse Justice Bistline at the same time the Court denied the motion for rehearing would not only result in gross injustice for Burton Baker, but would also constitute a great waste of judicial resources. This Court has greater obligations and responsibilities than rehearing frivolous claims.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari to review the Opinion and Judgment of the Supreme Court of the State of Idaho should be denied.

Respectfully submitted,

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